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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1963.

No. 264

O. M. TATE, JR., Trustee of Leeds Homes, Inc., et al.,
Petitioner,

v.

NATIONAL ACCEPTANCE COMPANY OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit.

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To the United States Court of Appeals for the Sixth Circuit.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, O. M. Tate, Jr., Trustee of Leeds Homes, Inc., et al., Debtors in corporate reorganization under

the Bankruptcy Act (herein called "Trustee") prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered June 9, 1964, in Case No. 15,605, styled Leeds Homes, Inc., O. M. Tate, Jr., Trustee, Appellant v. National Acceptance Company of America, Appellee. In said judgment the Sixth Circuit affirmed an order of the United States District Court for the Eastern District of Tennessee, Northern Division, entered July 15, 1963, allowing, over the Trustee's objection, a lien claim filed by Respondent, National Acceptance Company, of America, in the principal sum of $140,000.00, plus interest and cost as provided in said order, against the reorganization estate.

A certified Appendix Record in said case, together with the proceedings in the Sixth Circuit, is furnished herewith, in accordance with this Court's rules.

OPINION BELOW.

The Sixth Circuit Opinion appears in the back of this Petition. It also appears in the certified record. It has not yet been reported in the reports of the decisions of the Court of Appeals for the Sixth Circuit. The opinion of the United States District Court in this case is reported in 222 Fed. Sup. 20.

JURISDICTION.

The Court of Appeals' judgment affirming the Trial Court was entered June 9, 1964. This Court's jurisdiction is invoked under 28 U. S. C. Secs. 1254 (1) and 2101 (c).

BASIS FOR FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT.

This case arises out of a corporate reorganization proceeding under Chapter X of the Bankruptcy Act, 11 U. S. C., Secs. 501, et seq. The right of the Trustee to file objections to claims is provided for in 11 U. S. C., Secs. 587 and 75 (8); the title of the Trustee to Debtor's property is provided for in 11 U. S. C., Secs. 586 and 110.

QUESTIONS PRESENTED.

1. Was the Court of Appeals correct in introducing the concept that decision as to allowability of claims in Bankruptcy is to be based **solely** upon a maze of conflicting state decisions as to whether a defense creates "unenforceability" on the one hand, or "invalidity" on the other, without attempting to find and apply the policy of the Bankruptcy Law?

2. Was the Court of Appeals correct in ignoring and subordinating to conflicting technical language in state decisions the expressed policy of the Bankruptcy Act contained in 11 U. S. C., Sec. 110 (c), as to defenses to lien claims against the bankrupt's property?

3. Was the Court of Appeals correct in refusing to overrule the holding of the Trial Court that the lien claim involved an "interstate" transaction and that, accordingly, the Tennessee Foreign Corporation Law was not applicable as a defense?

STATUTES INVOLVED.

The Federal statutory provisions involved are contained in Title 11 of U. S. C., including Sections 596, 600, 93, 586, 587, 75 (8) and 110. The Tennessee Foreign Corporation Law is found in Tennessee Code Annotated, Sections 48-901, et seq.

STATEMENT OF THE CASE.

The facts are not in dispute and are fully set forth in the Opinion of the District Court (33a-58a).[1]

The lien claim involved in this case arose out of the loan by Respondent of $150,000.00 to Builders Warehouse, Inc., one of the Debtors in this bankruptcy corporate reorganization proceeding. This loan was made in the regular course of business by Respondent, National Acceptance Company of America, which carried on a lending business in a number of states, as well as in Tennessee. Respondent was organized under the laws of Delaware and was qualified to do business in Illinois, Michigan and Ohio (33a). It was not qualified to do business in Tennessee. Debtors were affiliated corporations engaged in the business of residential construction. The lien asserted by Respondent in filing its claim was based upon the Factor's Lien Act of Tennessee and consisted of a lien on the inventory of the Debtor, Builders Warehouse, Inc., which inventory was located in Tennessee.

The Trustee filed objections to the lien claim of Respondent based upon its doing business in Tennessee without qualifying under the Foreign Corporation Law of Tennessee.

Respondent maintains three or four resident agents in Tennessee and also sends agents and officers into Ten-

[1] Subsequent references are to pages in Appendix in certified record

nessee for the purpose of soliciting loans, advertising, negotiating loans, and helping the applicants for loans to fill out the loan forms and papers provided by Respondent (34a-35a). After the papers are thus filled out they are sent to the Home Office of Respondent in Chicago, for review and approval (35a). As in this case, if a question arises concerning any phase of the loan, Respondent sends an officer to Tennessee to negotiate such changes or revisions as are desired. Such changes are then sent by mail to Chicago for final review and approval (38a). Upon such approval the money is mailed to the applicant, as was done in this case (39a). The papers in this case provided for interest at the rate of 1/24th of 1% per day, or in excess of 15% per annum (38a). The papers provided that Illinois law was to govern (38a).

The Illinois law provides that a corporation may be charged such interest as it may agree to in writing. Tennessee law limits legal interest to 6%.

This loan was one of a number of other loans made by Respondent in Tennessee. In the period of 1959 through 1962, Respondent made a total of 78 loans in Tennessee, ranging from $4,000 to $760,000.00 in size. All of these loans were made at interest rates in excess of 6% and all but six of the loans were made at interest rates in excess of 12% (34a).

The agents of NAC operating in Tennessee also negotiate loans and lines of credit to Respondent from banks in Tennessee, as well as in other states (34a).

The Foreign Corporation Law of Tennessee provides that it shall be unlawful for any foreign corporation to engage in business in the state without filing a copy of its charter with the Secretary of State of Tennessee (TCA 48-902), appointing an agent for the service of process and

paying a $300.00 filing fee (TCA 48-904). Upon compliance with these provisions such corporation is entitled to all of the privileges, rights, immunities and subject to the liabilities of corporations organized under the laws of Tennessee (TCA 48-907).

The District Court found that the manner of doing business chosen by Respondent was obviously for the sake of minimizing taxes in Tennessee and of earning interest in excess of that allowed in Tennessee (73a, 53a). However, the District Court held that if the transaction violated the Foreign Corporation Law of Tennessee, under Tennessee law the claim was merely rendered unenforceable rather than void, and that the Bankruptcy Court would enforce the claim (48a, 52a). The District Court further held that this transaction was an "interstate" transaction, relying upon Tennessee cases which hold that Federal law governs the question of whether a transaction in interstate commerce is subject to the provisions of the Foreign Corporation Law, without citing authority as to what the Federal rule would be in this kind of transaction (53a-54a).

The Court of Appeals, on the appeal of the Trustee, sustained the holding of the District Court that the Bankruptcy Court properly enforces the claim where the law of the state makes the claim "unenforceable" rather than "void." The Court of Appeals then stated that it was not necessary for it to pass upon the question of whether the "interstate" nature of the transaction made the Tennessee Foreign Corporation Law inapplicable as a defense.

REASONS FOR GRANTING THE WRIT.

I. This Case Represents a Startling New Concept in Bankruptcy Law Which Requires the Allowance of State Created Claims as to Which a Broad Spectrum of Defenses Under State Law Might Be Raised, the Allowance to Be Based Entirely on the Technical Language of State Decisions as to Whether the Defensive Matter Makes the Claim "Unenforceable" or "Void" Without Applying Any Policy Under the Bankruptcy Act.

We believe that it is well settled that defenses to the allowance of claims in bankruptcy may successfully be raised in appropriate cases with respect to state created claims, based upon the Statutes of Frauds, Usury Laws, Statutes of Limitations, illegality, and other broad areas of the law common to all states. Under such defenses there is generally considerable conflict in the law between the states, and quite often in the law of the same state, as to whether the defensive matter makes a claim "unenforceable" or "void." We submit that there is absolutely no policy or premise in the Bankruptcy Law which would justify the development of the new concept contained in the Opinion below that allowance of claims in bankruptcy should be based upon whether the state law makes the claim unenforceable on the one hand, or void on the other.

The specific defense involved in this case is illegality by reason of non-compliance with the Foreign Corporation Law of Tennessee. Where the claim of illegality is raised with respect to any contract, whether it be for a gambling debt, a criminal or immoral contract, or what not, it can always be said that the contract is not "void"

but merely "unenforceable". Thus it is said in the Restatement of the Law of Contracts, Section 598:

> "The statement that all illegal bargains are void is not wholly accurate. . . . When relief is denied it is because the plaintiff is a wrongdoer, and to such a person the law denies relief. Courts do not wish to aid a man who founds his cause of action upon his own immoral or illegal act. If from the plaintiff's own statement or otherwise it appears that the bargain forming the basis of the action is opposed to public policy or transgresses statutory prohibitions, the courts ordinarily give him no assistance."

The very struggle that the lower courts obviously had in this case in determining what the law of Tennessee was as to unenforceability or invalidity, and the fact that both courts pointed out that a number of Tennessee decisions were contrary to the holding of the courts, shows the basic lack of reason in creating this new concept of bankruptcy law based upon technical language in state decisions.

And, yet, it is this type of decision in this field of law that is apt to lead the bankruptcy courts across the country into a hopeless quagmire of uncertainty, conflict and unreasonable decisions, with respect to defenses that are repeatedly raised in bankruptcy.

II. The Decision Below Contradicts and Subordinates to Conflicting State Decisions the Express Policy of the Bankruptcy Act With Respect to the Allowability of Liens Against the Bankrupt's Property.

The claim of Respondent relies upon a lien on Tennessee property of the Debtor under the Tennessee Factor's Lien Act. The opinion of the Court of Appeals recites that

there is a conflict in the Tennessee law as to whether the lien or contract under which the lien was asserted was unenforceable on the one hand, or invalid on the other. But there is no conflict as to the proposition that the Debtor would have had an effective defense to the assertion of the lien had there been no bankruptcy and had the suit been in a state court. The defense would have been as effectual whether or not the lien be considered "unenforceable" or "void". The same is true had the suit been in a Federal District court based upon diversity of citizenship. **Woods v. Interstate Realty Company**, 337 U. S. 535.

When claims are asserted against the **property** of the bankrupt, **11 U. S. C., Sec. 110 (c)** provides that the Trustee may have the benefit of all defenses available to the bankrupt, including Statutes of Limitations, Statutes of Frauds, Usury, and other defenses. In this section the Bankruptcy Act does not limit the availability of the defense to the Trustee, based upon whether the defense is for "unenforceability" or "invalidity". A defense is a "defense" whether it be based on either theory.

The broad policy expressed in 11 U. S. C., Sec. 110 (c) was to make effective the position of Trustee as the representative of all creditors with respect to the property of the Bankrupt and to give the Trustee the power to defend against and to strike down claims against **property** of the Bankrupt to the extent that the Bankrupt or a perfect lien creditor at the date of bankruptcy could have done. The decision below makes the result dependent upon the happenstance of bankruptcy which is inconsistent with the policy expressed in **Woods v. Interstate Realty Company**, *supra*. See the conflict which existed in the decisions prior to the **Woods** case in 133 A. L. R. 1171.

The Bankruptcy Act (11 U. S. C., Sec. 110 (e)) gives the Trustee all defenses but particularly uses as examples the Statutes of Frauds and the Statutes of Limitation. There is considerable conflict in state decisions as to whether a claim subject to the Statute of Frauds or Statute of Limitations is "unenforceable" or "void". Consequently, the decision below opens up the possibility of diverse decisions in bankruptcy courts on all sorts of such defenses, based upon conflicting state decisions as to unenforceability or invalidity rather than being based upon the single and express policy contained in the Bankruptcy Act. Application of the rule laid down by the Court of Appeals in this case would certainly leave havoc with respect to the defense of the Statute of Frauds. It is stated in **49 Am. Jur., p. 836, Statute of Frauds, Sec. 537**:

> "Whether an oral contract within the meaning of the Statute of Frauds is void or merely voidable because not in writing depends largely upon the wording of the particular statute, and decisions of the courts of one state are often of slight value to a court construing the statute of another, because of the diverse language used. Moreover, there are differences of opinion as to the construction of similar phrases expressive of the invalidity of oral contracts coming within the statute. Under most Statutes of Frauds, contracts not in writing or not signed by the party to be charged as required by the statute, are merely voidable and unenforceable at the option of the party sought to be charged, and are not thereby rendered absolutely void."

The same disastrous results are likely to arise in the field of Limitation of Actions. It is said in **34 Am. Jur., p. 20**, Limitation of Action, Section 11:

> "While a claim barred by a Statute of Limitations ceases to be a legal obligation and becomes a mere

moral one which the law will not lend its aid to enforce, according to the overwhelming weight of authority the statute operates on the remedy directly, and does not extinguish the right, notwithstanding it would seem more consistent with the operation of the statute as one of repose to hold that it not only goes to the remedy, but takes away the right itself, since otherwise only a partial repose is effected. Under this rule, a statute limiting the right of bringing an action ex contractu is not regarded as pertaining to the essence of a contract so as to extinguish the agreement, but merely as withdrawing from the parties, after a specified period, the privilege of using the courts to enforce the contract."

In attempting to apply the decision in **Vanston Bondholders Protective Committee v. Green**, 329 U. S. 156, the lower courts put reverse English on the language of the opinion in that case and give overriding effect to the technical language in state decisions contrary to the expressed policy of the Bankruptcy Act with respect to defenses to claims asserted against the property of a bankrupt. Such a tendency should be halted before widespread damage is done to the fabric of the Bankruptcy law.

III. Contrary to Decisions of This Court, the Judgment in This Case Renders Ineffective State Regulation of Foreign Loan Corporations Which Seek to Avoid State Usury Laws and State Tax Laws by Using Resident Agents and Officers Coming Into the State to Solicit, Negotiate and Prepare Papers Pertaining to Loans and Having Such Papers Sent Across State Lines for Final Approval.

Under Tennessee law the Foreign Corporation Act of Tennessee is applicable to foreign loan companies who

have agents in the state in the business of soliciting, negotiating and handling the details of the loans, even though the papers cross state lines for approval. Such intra-state activities make the Foreign Corporation Law applicable. **United States Savings & Loan Company v. Miller,** 47 S. W. 17; **State Life Insurance Company v. Dupre,** 19 Tenn. App. 301, 86 S. W. 2d 894. The determining factor is whether there are direct agents in the state soliciting and negotiating the loans. **Erwin National Bank v. Riddle,** 18 Tenn. App. 561, 79 S. W. 2d 1032; **Holston Natl. Bank v. Missionary Society,** 11 Tenn. App. 72; **Deposit Bank of Monroe County, Kentucky v. Cherry.** 20 Tenn. App. 305, 98 S. W. 2d 521.

Even though the Respondent used the device of having the loan papers sent across state lines for final approval in order to avoid state taxes and state usury laws (73a, 53a), the Trial Court held that this device rendered the transaction an "interstate" transaction, making the Foreign Corporation Law of Tennessee inapplicable. The Trial Court for this proposition cited Tennessee cases dealing with shipments of goods across state lines. Such Tennessee cases hold that Federal law governs the question of whether the interstate commerce clause of the Federal Constitution makes the Foreign Corporation Law of Tennessee inapplicable to transactions of foreign corporations in the shipment of goods. **Hollingshead Company v. Baker,** 4 Tenn. App. 362; **Burton Explosives, Inc. v. Strider,** 25 Tenn. App. 440, 158 S. W. 2d 731.

The District Court did not cite any Federal authority which would uphold its decision that the Foreign Corporation Law of Tennessee was made inapplicable to the transaction in suit because of the fact that the papers were sent across state lines for approval.

The Court of Appeals did not pass upon this question but said that it was not necessary to render a decision

thereon, because it sustained the action of the Trial Court on the alternative ground discussed above in this petition.

The facts on this question are not in dispute. It is merely a question of law. We believe that it is a very important question and has to do with the regulatory power of states over foreign corporations engaging in the type of business revealed in this case.

This was not a case dealing with transportation or the shipment of goods. It has to do with a transaction in intangibles. State regulatory power over intra-state phases of loan transactions crossing state lines has long been recognized by this Court. **Chattanooga Building and Loan Assoc. v. Denson**, 189 U. S. 408; **Hemphill v. Orloff**, 277 U. S. 537.

The last case cited relied upon **Paul v. Virginia**, 8 U. S. (Wallace) 168. The latter case asserted the proposition that the interstate commerce clause of the Federal Constitution did not pertain to intangible transactions such as life insurance.

Although transactions in intangibles may now come within the definition of "commerce", that is no reason for applying the commerce clause to defeat appropriate and long-recognized state regulation of such transactions even though they cross state lines. See **United States v. Southeastern Underwriters Assoc.**, 322 U. S. 533; **Robertson v. California**, 328 U. S. 440.

Thus, contrary to the decisions of this Court, the judgment below in this case represents a blow to state regulatory power in broad phases of transactions in intangibles where state law is necessary and appropriate.

CONCLUSION.

For the reasons assigned, Petitioner prays that the Petition for Writ of Certiorari should be granted and that the Writ issue to review the decision and judgment of the United States Court of Appeals for the Sixth Circuit entered in case No. 15,605, on June 9, 1964.

Respectfully submitted,

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APPENDIX.

Opinion of Court of Appeals.

Before Miller, Phillips and Edwards, Circuit Judges.

Phillips, Circuit Judge. This is an appeal from a judgment of the District Court allowing appellee's claim in a reorganization proceeding under Chapter X of the Bankruptcy Act.

An extensive statement of the background facts appears in the District Court opinion, prepared by District Judge Frank W. Wilson, 222 F. Supp. 20, and will not be repeated here. For our purposes, suffice it to say that the appellee, National Acceptance Company, hereafter NAC, made a loan to a subsidiary of Leeds Homes, a Tennessee corporation. Upon default NAC instituted a replevin suit in federal court, jurisdiction being based on diversity of citizenship. While that suit was pending, Leeds Homes and its subsidiaries filed a petition for reorganization under Chapter X of the Bankruptcy Act. After reserving the rights of the parties, the replevin action was dismissed, and NAC filed its proof of claim as a secured creditor in the reorganization proceeding.

In opposing the claim, the Trustee contends that NAC, a Delaware corporation, is doing business in Tennessee without qualifying as a foreign corporation as required by Tennessee law. T. C. A., Secs. 48-901-48-906. Therefore, the Trustee argues, the contract entered into by NAC is void, thereby rendering the claim void. The Trustee, in this respect, relies upon cases construing T. C. A., Sec. 48-908, which provides: "It shall be unlawful for any foreign corporation to engage in intrastate business in this state without complying with Secs. 48-901-48-906."

The District Court held against the Trustee on two alternative grounds: (1) that under Tennessee law a contract of a non-qualifying foreign corporation is not void but merely unenforceable in state courts, and that failure of the offending corporation to domesticate is not a good defense against it in a case where jurisdiction is based, not on diversity, but on federal bankruptcy law; and (2) that, in any event, the particular loan in question was an interstate transaction and therefore T. C. A. Sec. 50-908 was not applicable, since by its terms it applies only to intrastate business.

In our opinion, these two holdings are separate, and affirmance of the District Court is required if either holding can be upheld. With this in mind, we turn to the first question determined by the District Court.

The Supreme Court has now made it clear that federal, and not state, law will be applied in determining the allowability of claims in bankruptcy proceedings. Vanston Bondholders Protective Committee v. Green, 329 U. S. 156; American Surety Co. v. Sampsell, 327 U. S. 269; Prudence Realization Corp. v. Geist, 316 U. S. 89. See In re V-I-D, Inc., 198 F. 2d 392 (C. A. 7), cert. denied, 344 U. S. 914. At the same time, however, the Court has pointed out that federal law should be applied with "appropriate regard for rights acquired under state law." American Surety Co. v. Sampsell, 327 U. S. 269, 272.

Perhaps the rule was best explained by Justice Frankfurter in his concurring opinion in Vanston Bondholders Protective Committee v. Green, 329 U. S. 156. There the majority had reiterated the proposition that federal law will be used to determine how and what claims shall be allowed. 329 U. S. at 162-163. Justice Frankfurter agreed, but pointed out that the preliminary question

of whether or not a claim exists, to which federal law is then applied, must be determined with reference to state law. 329 U. S. at 169-70.

Therefore we turn to Tennessee law to determine whether the claim in the instant case is absolutely void, or is a claim which merely might be unenforceable in the state courts. The Tennessee courts on occasion have said that a transaction entered into by a nonqualifying foreign corporation is void. Peck-Williamson Heating & Ventilating Co. v. McKnight, 140 Tenn. 563, 205 S. W. 419; Insurance Co. v. Kennedy, 96 Tenn. 711, 36 S. W. 709; State Life Ins. Co. v. Dupre, 19 Tenn. App. 301, 86 S. W. 2d 894; see also Cary-Lombard Lumber Co. v. Thomas, 92 Tenn. 587, 22 S. W. 743. However, where the precise question has been presented, the Supreme Court of Tennessee has held that such contracts are not absolutely void, but may be unenforceable. Lloyd Thomas Co. v. Grosvenor, 144 Tenn. 347, 233 S. W. 669; Biggs v. Reliance Life Ins. Co., 137 Tenn. 598, 195 S. W. 174; Cunningham v. Shelby, 136 Tenn. 176, 188 S. W. 1147; Singer Mfg. Co. v. Draper, 103 Tenn. 262, 52 S. W. 879. In the Biggs case the court said: "It has never been ruled by this court that a contract so entered into was so far void as to be unenforceable by the other contracting party." 137 Tenn. at 603.

Therefore, it is our conclusion, in agreement with the District Court, that under Tennessee case law contracts and transactions of non-qualifying foreign corporations are not void, but are merely unenforceable in the state courts in actions initiated by the offending corporation. As said by the Supreme Court of Tennessee in Singer Mfg. Co. v. Draper, supra:

> "It must be borne in mind that as between the parties the contract is not void and the principle which prevents the plaintiff's recovery is that the Courts will not lend their aid to enforce contracts

and transactions made in fraud and violation of its laws, and which it has impliedly prohibited; nor will it lend its aid to repudiate them, in order to enable a party making them to reap a benefit therefrom, and this on grounds of public policy." 103 Tenn. at 265.

The fact that the state courts may refuse to enforce the claim has no bearing in the bankruptcy proceeding. Once it is determined that a claim exists, then federal law is applied to determine whether it should be allowed.

The Trustee makes the argument that if the claim would not be enforced in the state court then, under the Erie doctrine, Erie R. R. Co. v. Tompkins, 304 U. S. 64, it should not be enforced in a federal court sitting in that state. In support of this proposition, the Trustee cites Woods v. Interstate Realty Co., 337 U. S. 535. This argument overlooks the fact that jurisdiction in the instant case is based on federal bankruptcy law and not on diversity of citizenship. Thus a bankruptcy court does not sit "as if it were only another state court," and Erie does not apply. Vanston Bondholders Protective Committee v. Green, 329 U. S. 156, 162. Similarly, Woods v. Interstate Realty Co., supra, being a diversity case, has no bearing on this case. In re V-I-D, Inc., 198 F. 2d 329, 396 (C. A. 7), cert. denied 344 U. S. 914.

Having held that this claim cannot be defeated in a bankruptcy court on the ground that the creditor was a non-qualifying foreign corporation, we do not find it necessary to pass upon the holding of the District Court to the effect that the Tennessee foreign corporation law would not preclude an action in state courts to enforce this contract because this particular loan was an interstate transaction. Accordingly, we express no opinion on that issue.

The judgment of the District Court is affirmed.

STATUTES.

11 U. S. C., Sec. 93. Proof and allowance of claims.

(a) A proof of claim shall consist of a statement under oath, in writing and signed by a creditor, setting forth the claim; the consideration therefor; whether any and, if so, what securities are held therefor; and whether any and, if so, what payments have been made thereon; and that the claim is justly owing from the bankrupt to the creditor.

11 U. S. C., Sec. 75 (8). Trustees; duties.

(a) Trustee shall * * * examine all proofs of claim and object to the allowance of such claims as may be improper;

11 U. S. C., Sec. 110. Title to property.

(c) The trustee may have the benefit of all defenses available to the bankrupt as against third persons, including statutes of limitation, statutes of frauds, usury, and other personal defenses; and a waiver of any such defense by the bankrupt after bankruptcy shall not bind the trustee. The trustee, as to all property, whether or not coming into possession or control of the court, upon which a creditor of the bankrupt could have obtained a lien by legal or equitable proceedings at the date of bankruptcy, shall be deemed vested as of such date with all the rights, remedies, and powers of a creditor then holding a lien thereon by such proceedings, whether or not such a creditor actually exists.

11 U. S. C., Sec. 586. Trustee; title.

A trustee, upon his appointment and qualification, shall be vested with such title as a trustee appointed under section 72 of this title would have.

11 U. S. C., Sec. 587. Same; rights, powers, and duties.

Where not inconsistent with the provisions of this chapter, a trustee, upon his appointment and qualification, shall be vested with the same rights, be subject to the same duties, and exercise the same powers as a trustee appointed under section 72 of this title, and, if authorized by the judge, shall have and may exercise such additional rights and powers as a receiver in equity would have if appointed by a court of the United States for the property of the debtor.

11 U. S. C., Sec. 596. Filing and allowing proofs of claims; objections to allowances.

After the approval of the petition the judge shall prescribe the manner in which and fix a time within which the proofs of claim of creditors and of the interests of stockholders may be filed and allowed. Objections by any party in interest to the allowance of any such claims or interests shall be heard and summarily determined by the court.

11 U. S. C., Sec. 600. Rights, duties, and liabilities of creditors, etc.

Where not inconsistent with the provisions of this chapter, the rights, duties, and liabilities of creditors and of all other persons with respect to the property of the debtor shall be the same, before the approval of the petition, as in a bankruptcy proceeding before adjudication and, upon the approval of the petition, as in a bankruptcy proceeding upon adjudication.

Tennessee Code Annotated. Sec. 48-901.

Corporations admitted to engage in business.—

All corporations, chartered or organized under the laws of other states and/or countries for any purpose whatsoever, may be admitted to this state to engage in business upon the terms and conditions provided in this chapter.

Tennessee Code Annotated. Sec. 48-902. Filing of authenticated charter.—

Before any such corporation shall engage in any character of intrastate business within this state, it shall file in the office of the secretary of state a copy of its charter, duly authenticated by the certificate of its secretary or assistant secretary, under the corporate seal, if there be one, and if not, such fact shall be stated; or, in lieu thereof, such charter may be authenticated by the certificate, under seal, of the state official whose duty it is to record the original charter in the state in which such corporation is chartered.

Tennessee Code Annotated. Sec. 48-904. Appointment of agent for service of process-filing fee.—

Such corporation shall also designate some individual, firm or corporation, residing in this state and having an office or place of business open to the public, as its agent for service of process upon it in all actions or suits brought against it in the courts of this state, the fact of such agency to be plainly designated, at the address given as the location of its agent, by such corporation; and such corporation shall at the time of filing such charter and appointing such agent, pay into the office of the secretary of state the sum of three hundred dollars ($300).

Tennessee Code Annotated. Sec. 48-907. Domestication of Corporation.—

When such foreign corporation shall have duly complied with the provisions of Secs. 48-901-48-906, then it shall be entitled to all the privileges, rights, immunities, and subject to the liabilities of corporations organized and chartered under the laws of this state.

Tennessee Code Annotated. Sec. 48-908. Penalty for engaging in business without qualifying.

It shall be unlawful for any foreign corporation to engage in intrastate business in this state without complying with Secs. 48-901-47-906, and such corporations shall forfeit and pay to the state of Tennessee a penalty of not less than one hundred dollars ($100) nor more than five hundred dollars ($500), such penalty to be fixed by the jury trying the case. Actions for the recovery of such penalties shall be instituted and prosecuted by the attorney-general on behalf of the state of Tennessee by civil suit before any court of competent jurisdiction. Each day during which any such corporation engages in business without so complying with the provisions of this chapter shall constitute a separate violation.

Tennessee Code Annotated. Sec. 48-918. Interstate commerce—Insurance companies—Storage of goods in state.—

The provisions of this chapter shall not apply to corporations engaged exclusively in interstate commerce, nor to insurance companies duly qualified to do business in this state under the provisions of law

Neither shall the ownership by any foreign corporation of goods, wares or merchandise, which may be stored or brought to rest in public warehouses owned, controlled

or operated within the state of Tennessee by any individual partnership or corporation qualified to do business in Tennessee, or the delivery or distribution of such goods, wares or merchandise in consummation of contracts of sale made by such foreign corporations outside of the state of Tennessee, or other agreements made in relation to such goods, wares or merchandise by such foreign corporations outside of this state, be construed, deemed or treated as doing or attempting to do business by such foreign corporation in this state.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 264

O. M. TATE, JR., Trustee of Leeds Homes, Inc., *et al.*,
Petitioner,

v.

NATIONAL ACCEPTANCE COMPANY OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit has now been reported in 332 F.2d 648. The District Court's opinion is reported in 222 F. Supp. 20.

ADDITIONAL STATEMENT OF FACTS

We agree with petitioner that the facts are not in dispute and are fully set forth in the District Court opinion (33a-43a). In the Court of Appeals both parties accepted the District Court's findings, and the decision of the Court of Appeals is accordingly made on these undisputed findings.

Petitioner's summary of the District Court's findings (Pet., pp. 4-6) is, however, incomplete. It neglects to state the important finding of the District Court that the loan was an "interstate transaction" (53a-54a). Nor does it mention the facts upon which this finding was based: The loan application, the loan agreement and all other loan papers were signed by Leeds in Tennessee and transmitted to respondent's home office in Chicago for approval and acceptance (37a-39a; 21a-22a). They were subject to acceptance and were, in fact, accepted by respondent in Chicago (38a, 53a, 22a). The proceeds of the loan were disbursed from Chicago and the note itself was payable in Chicago (22a).

Petitioner characterizes the manner in which the loan was made as a "device" to avoid Tennessee taxes and usury laws (Pet., p. 12). The District Court's findings are to the contrary. It found that the loan was "bona fide completed in Chicago" and "not merely as a ruse or design to evade the Tennessee foreign corporation laws" (53a); and that "this particular agreement was not made in bad faith and fraudulently to evade the Tennessee usury laws" (55a).

QUESTIONS PRESENTED

Petitioner's statement of the questions presented by this case is neither accurate nor complete. The two questions presented, as stated by the Court of Appeals, are:

1. Does the Tennessee statute (Tenn. Code Ann. § 48-908), making it unlawful for a non-qualified corporation to engage in "intra-state business," apply to or affect the enforceability of an interstate commercial loan from a non-qualified Delaware corporation to a Tennessee corporation?

2. Assuming that the interstate loan would not have been enforceable by suit in the Tennessee courts, is the lender precluded by the Tennessee statute from proving its claim in the borrower's bankruptcy proceeding?

ARGUMENT

The District Court decided both questions in favor of respondent. It held (1) the loan being an interstate transaction, the Tennessee statute did not apply and the loan was enforceable in both the Tennessee and federal courts (53a-54a), and (2) even if the Tennessee statute were applicable the loan would not be void but merely unenforceable by suit in the state courts; accordingly the Tennessee statute would not prevent enforcement of the loan in a bankruptcy proceeding where jurisdiction is not based on diversity (46a-52a).

The Court of Appeals noted that if the District Court's decision on either question was correct, the decision should be affirmed. It upheld the District Court decision on the second question and found it unnecessary to pass upon the first.

The District Court's decision on both questions is clearly correct. Moreover, the first question (which is decisive of the case) involves only the construction of a Tennessee statute. It involves no question arising under the Constitution or under any federal statute. The District Court's construction of the Tennessee statute follows the uniform decisions of the courts of that state. These decisions are binding as to the meaning of the Statute.

The decisions of both courts on the second question, that the Tennessee statutes, if applicable, would not make the loan void, also follow the Tennessee decisions. In holding that this valid claim was enforceable in the Leeds bankruptcy, the courts below followed the rule of *Vanston Bondholders Protective Committee* v. *Green*, 329 U.S. 156 (1946), that federal and not state law applies in determining the allowance of claims in bankruptcy. The identical issue was decided in the same manner by the Seventh Circuit in *In re V.I.D., Inc.*, 198 F.2d 392 (7th Cir. 1952), and *certiorari* was refused. *Kelley, Glover & Vale, Inc., Trustee* v. *Kramer*, 344 U.S. 914 (1953).

1. The Tennessee Statute as Construed by the Tennessee Courts Does Not Apply to or Affect the Enforceability of an Interstate Transaction by a Non-Qualified Foreign Corporation. It Is Immaterial That the Corporation May Also Be Engaged in Intra-State Activities.

The petition for *certiorari* is based entirely on the incorrect assumption that respondent's loan would not have been enforceable in the Tennessee courts. Thus, petitioner asserts that because respondent had not qualified in Tennessee, Leeds "would have had an effective defense to the assertion of the lien had there been no bankruptcy and had the suit been in a state court" (Pet., p. 9).

Petitioner's assumption is contrary to both the plain language of the Tennessee statute and the construction given to it by the Tennessee courts. The loan was, as the District Court found, an interstate transaction. This finding is based on undisputed evidence and is decisive of the case. The Tennessee statute by its terms applies only to intra-state transactions: it merely makes it unlawful for a non-qualified foreign corporation "to engage in *intra-state business* in this state" (Tenn. Code Ann. § 48-908).[1]

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[1] The text of Tenn. Code Ann. § 48-908 is as follows:

> "*Penalty for engaging in business without qualifying.*—It shall be unlawful for any foreign corporation to engage in intrastate business in this state without complying with §§ 48-901—48-906, and such corporation shall forfeit and pay to the state of Tennessee a penalty of not less than one hundred dollars ($100) nor more than five hundred dollars ($500), such penalty to be fixed by the jury trying the case. Actions for the recovery of such penalties shall be instituted and prosecuted by the attorney-general on behalf of the state of Tennessee by civil suit before any court of competent jurisdiction. Each day during which any such corporation engages in business without complying with the provisions of this chapter shall constitute a separate violation."

The fine imposed by § 48-908 is the only statutory penalty provided for a violation of the statute. The Tennessee courts have held, however, that contracts of a non-qualified corporation that are subject to the statute (i.e., intra-state contracts) may not be enforced in the Tennessee courts. See Sixth Circuit opinion.

The Tennessee decisions, without exception, construe the statute as applying only to intra-state transactions and, hence, as not precluding a non-qualified corporation from enforcing an interstate transaction in the Tennessee courts. *Lloyd Thomas* v. *Grosvenor*, 144 Tenn. 347, 233 S.W. 669 (1921); *Burton Explosives, Inc.* v. *Strider*, 25 Tenn. App. 440, 158 S.W.2d 731 (1941), *cert. den.*, 2-7-42; *Deposit Bank of Monroe County, Ky.* v. *Cherry*, 20 Tenn. App. 305, 98 S.W.2d 521 (1936), *cert. den.*, 12-4-36; *Hollingshead Co.* v. *Baker*, 4 Tenn. App. 362 (1926), *cert. den.*, 1927; *Milan Milling & Mfg. Co.* v. *Gorten*, 93 Tenn. 590, 27 S.W. 971 (1894).

The Tennessee rule confining the statute to intra-state transactions has been strictly applied. Thus the Tennessee courts have uniformly held that the statute does not prevent a non-qualified corporation from suing on any interstate transaction even though it is also doing a substantial intra-state business in Tennessee. *Lloyd Thomas* v. *Grosvenor*, 144 Tenn. 347, 233 S.W. 669 at 671 (1921); *Burton Explosives, Inc.* v. *Strider*, 25 Tenn. App. 440, 158 S.W.2d 731 at 734 (1941), *cert. den.*, 2-7-42; *Deposit Bank of Monroe County, Ky.* v. *Cherry*, 20 Tenn. App. 305, 98 S.W.2d 521 at 525 (1936). Under the Tennessee decisions the test in every case is not the general activities of the foreign corporation in Tennessee but whether the *particular* transaction is interstate or intra-state; if it is "not an intra-state transaction but an interstate transaction . . . our statutes respecting foreign corporations have no application to it," and it is immaterial that the corporation may also be "carrying on a portion of its ordinary business in the state." *Lloyd Thomas* v. *Grosvenor*, 144 Tenn. 347, 233 S.W. 669 at 671 (1921).

Even when a single sale by a non-qualified foreign corporation involves both intra-state and interstate transactions, the Tennessee courts hold that the statute does

not prevent a suit and recovery on the interstate portion. *Hollingshead Co.* v. *Baker*, 4 Tenn. App. 362 (1926), *cert. den.*, 1927.

Petitioner attempts to distinguish the foregoing cases on the ground that they did not involve loans (Pet., pp. 12-13). The Tennessee courts make no such distinction. On the contrary, they have specifically held that interstate loans, like interstate sales, are not affected by the Tennessee statute. *Shoenterprise Corporation* v. *Butler*, 46 Tenn. App. 302, 329 S.W.2d 361 at 363 (1959); *Deposit Bank of Monroe County, Ky.* v. *Cherry*, 20 Tenn. App. 305, 98 S.W.2d 521 (1936); *Holston National Bank* v. *Missionary Society*, 11 Tenn. App. 72 (1929), *cert. den.*, 3 7 30. As in the case of other interstate transactions the Tennessee courts hold that the lender's right to sue on an interstate loan is unaffected by the fact that it "had been and was doing some substantial part of its ordinary business in Tennessee in violation of statute." *Deposit Bank of Monroe County, Ky.* v. *Cherry*, 20 Tenn. App. 305, 98 S.W.2d at 525 (1936). See also *Norton* v. *Union Bank & Trust Co.*, 46 S.W. 944 (1898), and the discussion, in that case, at p. 946, of two unreported decisions of the Supreme Court of Tennessee.

Nothing in the Tennessee statute or in any Tennessee decision supports petitioner's assertion that "the determining factor is whether the foreign corporation has agents in the state." In fact, the *Burton*, *Hollingshead* and *Cherry* cases involved situations in which the plaintiff did have agents in the state but in each instance the court held that this circumstance did not make the statute applicable since the transaction was, in fact, an interstate one.

We do not concede and the District Court did not find that respondent is or ever has been doing an intra-state business in Tennessee in connection with other loans.

Whether it was or was not is irrelevant under the Tennessee statute and the decisions of the Tennessee courts since the loan to Leeds was unquestionably an interstate loan.

2. Even Assuming That the Interstate Loan Would Not Have Been Enforceable in the Tennessee Courts, the Loan Is a Valid and Subsisting Claim Under Tennessee Law and It Is, Therefore, Allowable in the Leeds Bankruptcy Proceeding. The Bankruptcy Law and Not the Tennessee Statute Governs the Allowability of a Valid Claim.

Both courts below held that under Tennessee law a non-qualified foreign corporation's contracts, if subject to the statute, are not void but are merely unenforceable in the Tennessee courts. This is clearly a correct determination of Tennessee law as decided by the Supreme Court of Tennessee. *Singer Mfg. Co.* v. *Draper*, 103 Tenn. 262, 52 S.W. 879 (1899); *Biggs* v. *Reliance Life Ins. Co.*, 137 Tenn. 598, 195 S.W. 174 (1917); *Cunnyngham* v. *Shelby*, 136 Tenn. 176, 188 S.W. 1147 (1916); *Lummus Cotton Gin Co.* v. *Arnold*, 151 Tenn. 540, 269 S.W. 906 (1925). These authorities uniformly hold that a contract of a non-qualified foreign corporation is valid but that as a penalty for noncompliance with the statute the Tennessee courts will not lend their aid in enforcing it.

Contrary to petitioner's assertion (Pet., pp. 8-9), there is no conflict in the Tennessee decisions on this point. As noted by both courts below, the allegedly conflicting Tennessee authorities involve mere *dicta* in cases in which the precise question was not presented (Ct. of App. Pet., p. 17; Dist. Ct., 50a-51a).

Since the loan was valid under Tennessee law, both courts below held that its allowance in bankruptcy was to be determined by the Bankruptcy Act and not by Tennessee law. In so holding the courts below followed the rule of *Vanston Bondholders Protective Committee* v.

Green, 329 U.S. 156 (1946), that in bankruptcy, as distinguished from diversity cases, the only question to be determined by state law is whether the claims of creditors "are valid and subsisting obligations against the bankrupt at the time the petition in bankruptcy is filed." *Id.* at 161. Once this preliminary question has been determined in favor of the claim, its allowance is to be determined exclusively by the Bankruptcy Act. In *Vanston* the court said:

> "In determining what claims are allowable and how a debtor's assets shall be distributed, a bankruptcy court does not apply the law of the state where it sits. *Erie R.R.* v. *Tompkins*, 304 U. S. 64, has no such implication. That case decided that a federal district court acquiring jurisdiction because of diversity of citizenshp (sic) should adjudicate controversies as if it were only another state court. *See Holmberg* v. *Armbrecht*, 327 U.S. 392. But bankruptcy courts must administer and enforce the Bankruptcy Act as interpreted by this Court in accordance with authority granted by Congress to determine how and what claims shall be allowed under equitable principles." (329 U.S. at 162-163)

Under Tennessee law respondent's loan was a valid and subsisting claim against Leeds at the time the petition in bankruptcy was filed. Nothing in the Bankruptcy Act disqualifies respondent from proving its claim or prohibits its allowance in bankruptcy. Nor does the Tennessee statute even purport to do so. The statute (if applicable at all) goes no further than to close the Tennessee courts to a non-qualified corporation. It leaves the corporation's rights otherwise unimpaired, including the right to enforce the valid contract in bankruptcy or in any other court.[2] Even if it had attempted to do so, Tennessee could not prescribe the qualifications of a claimant in a federal bankruptcy court.

For the foregoing reasons it was settled law before *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), that a state statute, which did not make contracts of a non-complying foreign corporation void but merely disqualified the corporation from suing thereon in the courts of the state, did not prevent the corporation from maintaining an action in the federal courts. *David Lupton's Sons Company* v. *Automobile Club of America*, 225 U.S. 489 (1912).[3] Insofar as diversity cases are concerned this rule became obsolete under the doctrine adopted by *Erie* that in diversity cases a federal court is, in effect, another court of the state in which it sits and hence cannot "entertain suits in diversity cases that could not be brought in the respective state courts." *Angel* v. *Bullington*, 330 U.S. 183, 192 (1947); *Woods* v. *Interstate Realty Co.*, 337 U.S. 535, 538 (1949). Both the *Angel* and *Woods* decisions, how-

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[2] Many states have statutes which by their express terms or by judicial construction are similar to Tenn. Code Ann. § 48-908. It is well settled that since such statutes did not make the contract void they do not prevent the non-complying corporation from maintaining a suit thereon in another state. 23 AM. JUR., *Foreign Corporations*, § 335, p. 313 (1940), and cases cited therein. See also the discussion of this question in *David Lupton's Sons Company* v. *Automobile Club of America*, 225 U.S. 489, 499-500 (1912).

[3] In the *Luptons Sons* case Mr. Justice Hughes stated with respect to a New York foreign corporation statute similar to the Tennessee statute:

> "It must follow, upon the similar construction of § 15 as it read at the time of the transaction in question, that the Lupton Company, whether or not it was doing a local business in New York, had the right to bring this suit in the Federal court. The State could not prescribe the qualifications of suitors in the courts of the United States, and could not deprive of their privileges those who were entitled under the Constitution and laws of the United States to resort to the Federal courts for the enforcement of a valid contract. . . . The State in the statute before us made no such attempt. The only penalty it imposed, to quote again from the *Mahar Case*, was a disability to sue 'in the courts of New York.'" (225 U.S. at 499-500.)

ever, carefully limit their holding to cases in which jurisdiction is founded upon diversity of citizenship, and this Court has held that the *Erie* rule is not applicable to cases in which jurisdiction arises under the Bankruptcy Act. *Vanston Bondholders Protective Committee* v. *Green*, 329 U.S. 156 (1946). That case holds that a bankruptcy court does not sit "as if it were only another state court" but "must administer and enforce the Bankruptcy Act as interpreted by this court . . . to determine how and what claims shall be allowed under equitable principles." *Id.* at 162-163. See to the same effect, *American Surety Co.* v. *Sampsell*, 327 U.S. 269 (1946); *Holmberg* v. *Armbrecht*, 327 U.S. 392 (1946); *Prudence Realization Corporation* v. *Geist*, 316 U.S. 89 (1942).

In re V.I.D., Inc., 198 F.2d 392 (7th Cir. 1952), *cert. den.*, 344 U.S. 914 (1953), is squarely in point. It involved the allowance, in a bankruptcy proceeding in the District Court for Indiana, of mortgage bonds issued pursuant to a trust indenture with a foreign corporation which had not qualified to do business in Indiana. The Seventh Circuit concluded that under Indiana law, like Tennessee law, the contracts of a non-qualified corporation are not void but are merely unenforceable in the Indiana courts (198 F.2d at 394-395). The court recognized that under the *Woods* case the Indiana statute would also prevent suit on the claim in a diversity case in the federal court. It held, however, on the authority of the *Vanston* case, that a bankruptcy court is "not governed by state laws" and that the claim was, therefore, enforceable in the bankruptcy proceeding.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for writ of certiorari should be denied.

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